In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. . . . . .

SAMUEL W. WINGER,
Administrator of the Estate of Samuel W. Winger, Jr.,
Deceased,
Petitioner,

vs.

McCULLOUGH TRANSFER COMPANY,
Respondent.

BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

Petitioner, plaintiff below, filed action in the Common Pleas Court of Mahoning County, Ohio, for damages for the wrongful death of Samuel W. Winger, Jr., aged 22. The action was brought for the benefit of his widow and children.

The Respondent, defendant below, was a transportation company operating under the laws of the Public Utilities Commission of the State of Ohio and licensed under the Interstate Commerce Act of the United States to engage in transportation service in five states, including the states of Ohio and Pennsylvania.

Charles Bolton, aged 37, a resident of Pennsylvania, was employed by the respondent corporation to haul coal in his truck from a mine near Grove City, Pennsylvania, to Youngstown, Ohio, for which he received $1.20 per ton. The respondent furnished the State and Federal signs displayed on the truck and had complied with the regulations

in the State of Ohio and was also granted a franchise by the Interstate Commerce Commission. The owner-operator of the truck had been employed in such capacity for about a year prior to the accident. About twenty owners and operators of trucks were employed by the respondent company in a similar capacity.

The day of the accident petitioner's decedent was riding on Bolton's truck at the request of Homer Zook, the foreman and truck dispatcher for the respondent company. A collision occurred betwen Bolton's truck and an automobile on a public highway in Mahoning County, Ohio. The decedent was thrown from the cab of the truck and instantly killed.

The jury trial resulted in a verdict for the petitioner and judgment was entered thereon. Respondent appealed to the Court of Appeals for the Seventh Judicial District of Ohio which reversed the trial court and entered final judgment for the respondent company. A motion to certify the record was requested of the Supreme Court of the State of Ohio. Said Court denied such motion and this petition is now filed for a writ of certiorari. (R., 88.)

SPECIFICATIONS OF ERROR.

1. The Court of Appeals of the Seventh Judicial District of Ohio erred in reversing the Trial Court and entering final judgment against the petitioner.

2. The Court of Appeals of the Seventh Judicial District of Ohio failed to apply Title 49, Sections 301 to 327 inclusive of the Interstate Commerce Act and the Rules and Regulations of the Interstate Commerce Commission adopted pursuant thereto.

3. The petitioner was denied due process of law as afforded by the Constitution of the State of Ohio and the Constitution of the United States.

ARGUMENT AND LAW.

Charles Bolton, the owner-driver of the truck employed by the respondent did not have a permit to operate in interstate commerce, nor had he qualified to operate under the laws of the Public Utilities Commission of the State of Ohio. The respondent corporation had been granted a franchise by the Interstate Commerce Commission of the United States and had complied with the regulations of the Public Utilities Commission of the State of Ohio. The necessary identifications were carried on Bolton's truck during the transportation service.

Counsel for the petitioner contends that the relationship between the owner-driver of the truck and the respondent corporation is fixed by the federal statutes as well as by the rules and regulations of the Interstate Commerce Commission. The Court of Appeals of the Seventh Judicial District of Ohio in failing to apply the Federal law and the rules of the Commission committed error prejudicial to the rights of said petitioner. Title 49, Section 8, Sections 301-327 USCA, Part 2, Motor Carriers Act as amended September 18, 1940, established the law in regard to the operation of motor trucks under a permit issued by the Interstate Commerce Commission.

Title 49, Section 302, USCA—Application of Provisions:

> "(a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission."

Title 49, Section 315, USCA, fixes the liability for bodily injury and loss of life or for loss or damage to property of others, as follows:

Section 315. Security for Protection of Public:

"No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others. * * *"

Title 49, Section 324, USCA. Identification Plates for Interstate Motor Carriers:

"The Commission is authorized, under such rules and regulations as it shall prescribe, to require the display of suitable identification plate or plates, upon any motor vehicle used in transportation subject to any of the provisions of this chapter, to provide for the issuance of such plates, and to receive the payment by such carriers of the reasonable cost thereof. All moneys so collected shall be paid into the Treasury of the United States. Any substitution, transfer, or use of any such identification plate or plates, except such as may be duly authorized by the Commission, is prohibited and shall be unlawful."

Pursuant to Section 325, *supra,* effective September 1, 1947, the Interstate Commerce Commission enacted the

following rules and regulations as to the display of certificates by motor carriers.

"166.1. Vehicles subject to regulations.

Every for-hire motor carrier operating under authority granted pursuant to the Interstate Commerce Act (24 Stat. 379, as amended; 49 U. S. C. 1 et seq.) shall observe the rules and regulations prescribed in this part respecting each motor vehicle operating under such authority."

"166.2. Method of Identification.

There shall be displayed on both sides of each vehicle operated under its own power, either alone or in combination, except as otherwise provided in this part respecting vehicles in driveaway service, the name or trade name, of the motor carrier under whose authority the vehicle or vehicles is or are being operated, and the certificate, permit or docket number assigned to such operating authority by the Interstate Commerce Commission. Such certificate, permit, or docket number or numbers, shall be in the following form: 'I. C. C. _____,' but shall not include any sub numbers which may have been assigned. If the name of any persons other than the operating carrier appears on the vehicle operated under its own power, either alone or in combination, the name of the operating carrier shall be followed by the information required above, and be preceded by the words, 'Operated by.' Nothing in the regulations in this part shall prohibit display of such additional identification as is not inconsistent herewith."

In *Brown, Admx., v. L. H. Bottoms Truck Lines, Inc.*, 227 N. C. 299, 42 S. E. 2d 71, the Court clearly sets forth the purpose and intent of the Federal Statutes regulating interstate truck carriers and the necessity and reason for

requiring such carriers or anyone operating under them to display identification plates. At page 74 the Court said:

> "(5-8) * * * Under the Federal statute the defendant was required to attach to each vehicle used in such transportation the identification or license plates prescribed for it by the Commission. 49 U. S. C. A. 324. In order to augment its equipment for the transportation of goods, the defendant obtained by contract the use of Brown's owner-driven truck to be added to its own fleet of trucks for the transportation of certain goods from High Point, Carolina, to Norfolk, Virginia, and in the contract it was stipulated, in accordance with the requirements of the statute and the regulations of the Interstate Commerce Commission, that the license plates issued by the Commission to the defendant Truck Lines for its own trucks must be attached to and used by the Brown truck, thus identifying the truck as being used by the named defendant under its franchise. The Brown truck could not have been driven over the highways to Virginia in interstate commerce without being thus identified. It could not have been used independently or in any other way for this interstate transportation. The truck for the period of transportation was in the possession of defendant Truck Lines, and only at the end of the journey was it to be delivered back to lessor * * *."

In the case at bar the respondent company was carrying on the business under a franchise granted by public authority and cannot by this privilege bestowed upon it escape or relieve itself from liability for acts of negligence resulting in injury or death to third persons by delegating its duties to independent contractors, corporations, agents, servants or individuals.

In *Venuto v. Robinson, et al.*, 118 Fed. 2d 679, it was held that the motor carrier company operating under a

franchise was liable for the negligent acts of an independent contractor who was engaged to haul between points in North Carolina and New England, and at page 682 the Court said:

> "The rule is stated in the Restatement of Torts, Par. 428: 'An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.' "
>
> "* * * The carriage of freight in high powered motor vehicles on public highways is certainly business attended with very considerable risk. The rule stated has been applied in cases against railroads to hold a lessor railroad liable even where the relationship has been lessor and lessee without even general control or direction by the lessor over the lessee. See annotation, 28 A. L. R. 122, and following. The application to one employed by a common carrier by motor truck upon the public highways is an even clearer case. See Duncan v. Evans, 134 Ohio State 486, 17 N. E. 2d 913."

See also *Hodges, et al., v. Johnson, et al.*, 52 Fed. Sup. 488, wherein it was held that an operator of an empty truck returning from his original mission, that the return trip as well as the mission to Roanoke, Virginia, from Charlotte, North Carolina, was a necessary part of the same trip and was a part of the entire undertaking and was all operated under the order of the franchise carrier.

It is the contention of counsel that the case at bar is controlled by federal laws and regulations regarding motor carriers. Nevertheless in the State of Ohio, by reason of Section 614-115 of the General Code, the liability for acts of negligence resulting in injury or death

to third persons is similar to Section 315, Title 49, U. S. C. A.

Pursuant to the Federal Statutes, the Interstate Commerce in enacting rules which have been referred to above, adopted Rule No. 4, of August 19, 1936, under Section 208-A of the Interstate Commerce Act, as follows:

> "Q. Under what circumstances may a carrier add to its equipment by leasing a vehicle and obtaining the service of its owner-driver?
>
> "A. The lease or other arrangement by which the equipment of an authorized operator is augmented, must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such way as to be good against all the world, including the lessor; that the operation thereof must be conducted under the supervision and control of such carrier; and that the vehicle must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

The certificate of public convenience and necessity issued by the Interstate Commerce Commission to the respondent therefore made it mandatory that by augmenting the equipment of Bolton the respondent corporation stood in the relationship of master and servant and Bolton's truck was taken by the McCullough Transfer Company as its own equipment against the whole world. The petitioner's decedent was not employed by Bolton or the McCullough Transfer Company but was riding upon said truck at the request of Homer Zook, the truck dispatcher. The trial jury found by a special interrogatory submitted by the respondent that the petitioner's decedent was riding upon the Bolton truck as a helper to Bolton, as suggested by Homer Zook.

It is therefore apparent the jury found under the evidence that peitioner's decedent was placed upon said truck and was riding thereon at the time of the collision by an employe of the respondent company with his consent and approval. Therefore counsel contends that any negligence upon the part of Bolton causing injury or death is a question to be submitted to a jury. The action of the Court of Appeals in reversing said verdict and judgment denied due process of law to the petitioner.

In *U. S. v. La Tuff Transfer Service*, U. S. District Court, Minnesota, Third Division, 95 Fed. Supp. 375, at page 379:

> "A common carrier by motor vehicle is prohibited from engaging in interstate commerce unless there is in force a certificate of public convenience and necessity from the Commission authorizing such operations, 49 U. S. C. A. 306(a)."
>
> "The 'services' and 'transportation' to which this part applies are defined, 49 U. S. C. A. 303 (a) (19), as follows: 'The services and transportation to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.' "

And at page 380:

> "In determining the status of a lessor of motor equipment when vehicles are used by a shipper, the courts have disregarded form, and look only to the substance. As stated by the Circuit Court of Appeals in Georgia Truck System v. Interstate Commerce Commission, 5 Cir., 123 Fed. 2d, 210, 212: '* * * though its (lessors) operations have been to some extent in-

vested with the form of a renting or hiring business, this investiture is but a device or subterfuge behind and under which appellant, in substance and in reality, operates a transportation business. * * * In the argument much refinement was indulged in, much speculation was raised, many authorities cited, as to how close one might approach the line of transportation without being regarded as having stepped over it. We need not indulge here in any of these refinements. It is sufficient for us to say that the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire * * *' "

And at page 381:

"Motor carrier operations must be bona fide and conducted in good faith, without a shadow of subterfuge or attempted evasion of the letter or obligation of the law. Any plan or scheme, whether by purported lease, agency, or other device disguising the true nature of the transportation will be of no avail for that purpose. Where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements which purport to give the alleged lessee the status of a private carrier. Interstate Commerce Commission v. Isner, 92 Fed. Supp. 582, 583; Interstate Commerce Commission v. F. & F. Truck Leasing Company, D. C., 78 Fed. Supp. 13; Georgia Truck System v. I. C. C., 5 Cir., 123 Fed. 2d 210; Interstate Commerce Commission v. Pickard, D. C., 42 Fed. Supp. 351; John J. Casale, Inc., Contract Carrier Application, 44 M. C. C. 45, 49 M. C. C. 15; and Bridge Auto Renting Corporation v. Pedrick, 2 Cir., 174 Fed. 2d 733."

And at page 383:

> "In a well considered case, Wagner v. Larsen, 174 Wis. 26, 182 N. W. 336, 337, the law is stated thus:
>
> 'Where an owner hires his team and driver, or his automobile and chauffeur, or his machine and operator to another to do work to be designated and as directed by the hirer, the hirer having no authority by the terms of the contract of hire to discharge the driver, chauffeur, or operator, and substitute another, the driver, chauffeur, or operator remains the servant of the owner in matters relating to the safety and management of the team, automobile, or machine, and the owner is liable to third persons for damages resulting from the negligent management or operation of the team, automobile, or machine by such servant.
>
> 'The reason is that the hiring is not of the team distinct from the driver or of the driver distinct from the team, but is the hiring of the entity composed of the two. While the hirer acquires dominion or authority over the entity to designate the work that shall be done and direct the manner of doing it, he acquires no authority to direct how the team shall be driven, managed, or cared for, nor can he divide the entity by separating the driver from the team. He may dispense with the services of the entity—the driver and the team—but he cannot discharge the driver and substitute another.' "

In the case at bar Charles Bolton, the owner-operator, was employed exclusively by the respondent corporation. He was personally licensed by and through the McCullough Transfer Company to drive a motor vehicle in interstate commerce, complying with the rules and regulations of all interstate drivers of motor carriers. The petitioner's decedent was not employed in any manner nor licensed in any way to operate a motor vehicle in

interstate commerce. The sole question is to determine the legal relationship existing between the owner-operator of the truck and the respondent corporation, in view of the Federal Statutes, Title 49, Chapter 8, Sections 301 to 327 inclusive, and the Rules and Regulations of the Interstate Commerce Commission.

The judgment of the Court of Appeals of the Seventh Judicial District of Ohio, being the highest court of said State passing upon the case at bar, ignored and refused to apply the Federal Statutes and rules and regulations adopted by the Interstate Commerce Commission. The petitioner feels he is entitled to a writ of certiorari since he has been denied due process of law.

This case presents a question of great and general interest because this Court has not passed upon the question. A pronouncement by the Supreme Court of the United States will establish a rule of uniformity for the courts to follow in this important branch of present day transportation.

Respectfully submitted,

RUSSELL G. MOCK,
VENICE J. LAMB,
DAVID C. HAYNES,
Attorneys for Petitioner.

APPENDIX.

Opinion of the Court of Appeals.

IN THE COURT OF APPEALS.

STATE OF OHIO, MAHONING COUNTY,
SEVENTH DISTRICT.

SAMUEL W. WINGER,
Administrator of the Estate of
Samuel W. Winger, Jr., Deceased,
Plaintiff-Appellee,

VS.

McCULLOUGH TRANSFER COMPANY,
Defendant-Appellant.

OPINION.
Case No. 3366.

APPEARANCES.

Russell G. Mock, Youngstown, Ohio, *for Plaintiff-Appellee.*
William E. Pfau, Youngstown, Ohio, *for Defendant-Appellant.*

HON. JOHN C. NICHOLS,
HON. LYNN B. GRIFFITH,
HON. ELMER T. PHILLIPS, *JJ.*

Dated: June 1, 1951.

PER CURIAM.

Homer Zook, the authorized agent of the defendant, requested Samuel Winger, Jr., to drive Bolton's truck from the mine at Grove City, Pennsylvania, to the scales

situated at the Rod and Wire Department of the Youngstown Sheet and Tube Company at Struthers, Ohio, and thence back to Bolton's home at Sharpsville. Winger drove it to the scales and from there on Bolton took the wheel and drove the truck.

The defendant, McCullough Transfer Company, is not answerable in damages unless Samuel Winger, Jr., at the time of the accident was acting for McCullough in the prosecution of its business.

The principal is only bound by the authorized acts of his agent, and the power of the agent to charge his principal must be traced directly to his authority. Winger was placed at the wheel of this truck at Grove City because Bolton was intoxicated. He was to drive it to Struthers and after unloading the coal he was to drive it back to Sharpsville. Winger abandoned the mission of his agency at Struthers and Bolton drove it from there on to the scene of the accident. This conduct on the part of Winger violated the purpose of his presence on the truck as well as the specific instructions of Zook. Had Winger been at the wheel at the time of the accident then an entirely different situation presents itself.

Upon this particular trip Bolton had been refused the right to drive the truck in the business of the McCullough Transfer Company and Winger had been given that authority. Winger had no right or power to transfer his authority back to Bolton in Bolton's drunken condition.

Zook entrusted the operation of the truck to Winger, but Winger changed his status at Struthers from that of a driver to one of a rider. At Struthers he ceased to act for McCullough. He repudiated his mission and failed, or refused, to exercise the duty entrusted to him at the mines. He defaulted in this duty. When Winger permitted Bolton

to take the wheel at Struthers he did an act outside the scope of his employment, for which the defendant is not responsible.

The judgment of the Court of Common Pleas is reversed because contrary to law.

Now coming to enter the judgment which the trial judge should have entered final judgment is rendered for the defendant, McCullough Transfer Company.